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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-1841

AMERICAN BROADCASTING COMPANIES, INC.,

Petitioner,

v.

HOME BOX OFFICE, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONER'S REPLY BRIEF

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TABLE OF AUTHORITIES

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American Broadcasting Companies, Inc. ("ABC") submits this reply to the oppositions of respondents Home Box Office, Inc., *et al.* ("Home Box Office"), Columbia Pictures Industries, Inc., *et al.* ("Columbia"), and National Citizens Committee for Broadcasting ("NCCB").

I.

Respondents seek to avoid (much as did the court below) the essential public interest issues associated with rapidly developing pay cable services. They characterize pay cable as just another incident of normal competition, the consequences of which must be presumed to be of public value. But pay cable does not compete normally and must therefore be regulated so that the consuming public will not be denied the protections which marketplace competition would impose.

The only pay cable operations to which the regulations here in issue apply are those associated with cable television systems carrying multiple broadcast signals on the privileged basis of compulsory license.[1] No regulation, existing or proposed, affects pay or cable operations which do not carry television broadcast signals.

Using the advantage of multiple broadcast signals to get in the home, the pay cable operator then offers his pay channels at additional charge. Congress explicitly recognized the need for regulation of this "piggyback" service and cautioned:[2]

> "We would, therefore, caution the Federal Communications Commission, and others who make determinations concerning communications policy, not to rely upon any action of this Committee as a basis

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[1]Under the 1976 Copyright Legislation (90 Stat. 2541, 17 U.S.C. Sec. 101 *et seq.*), it was estimated that the entire cable industry would pay $8.7 million in copyright royalty fees (approximately 81 cents per subscriber per year) for all television programming sold to its subscribers (*Report on Copyright Law Revision*, H.R. Rep.No. 94-1476, 94th Cong. 2d Sess. 91 (1976). For the same programming, the television industry, in 1976, paid approximately $2.5 billion. (See *TV Broadcast Financial Data–1976*, FCC Public Notice, August 29, 1977).

[2]*Report on Copyright Law Revision, supra*, at p. 89.

> for any significant changes in the delicate balance of regulation in the areas where the Congress has not resolved the issue. Specifically, we would urge the Federal Communications Commission to understand that it was not the intent of this bill to touch on issues such as pay cable regulation or increased use of imported distant signals. These matters are ones of communications policy. . . ."

In addition, respondents assert that regulation of cable and pay cable should be avoided because cable represents a "great potential as a national broadband communications system and as an antidote to broadcasting spectrum-scarcity and network dominance."[3] But, as conceded by the court below, the undisputed facts are that because of the stupendous costs associated with wiring the nation, cable and its pay cable adjunct cannot provide a national service but only a service to a small, probably affluent, minority.[4] That minority, however, as found by the Commission (based upon undisputed estimates by Stanford Research Institute and others) has the clear economic capacity to outbid the advertiser-supported television system for its most popular entertainment and sports programs which are now available without charge to all of the people of the United States.[5]

The important public interest issue before this Court, therefore, is whether the cable television industry, attracting subscribers through subsidized use of billions of dollars of television programming, is to be permitted, without regulation or restraint, to develop a pay cable service for a minority of the population, in a way which threatens the essential character and economic viability of the present free system, available to all.

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[3]Home Box Office Opp., p. 3.

[4]See ABC's "Petition for a Writ of Certiorari," p. 10.

[5]*Ibid.* p. 11.

The court below erroneously ruled, we believe, that the Commission is without any authority to consider and regulate the public interest consequences of such developments and that any regulatory effort is subject to grave Constitutional objection.

II.

In *Southwestern,*[6] this Court held that the Commission could consider the potential economic impact on local television services predictable from cable's importation of multiple distant signals. The Court unanimously concluded that assessment of such economic impact, and its effect on public service, were necessary to effective performance of the Commission's chief responsibility to foster and maintain a nationwide television service.

In *Midwest,*[7] the Court considered whether the Commission could go further and require cable systems to provide public benefits, through local originations, in return for the privilege of broadcast signal carriage. A narrowly divided court found such authority.

The opinion below is hopelessly at odds with these decisions. Here, the Commission's regulation addressed, not the relatively indirect public interest consequences from distant signal importation, but the public interest problems from direct programming loss. In addition, the Commission's pay cable regulation sought to induce pay television to provide diverse and innovative programming—not simply to sell to a few programming now available to all.

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[6] *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968).

[7] *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972).

The opinion below drew a line stopping Commission jurisdiction at a point which makes no sense whatsoever from the public's standpoint. Under the decision, the Commission—with clear authority to regulate signal carriage—must idly permit pay cable operations to affect adversely the programming content of those signals. The agency's broad authority under *Southwestern* and *Midwest* is thus reduced to impotence.

III.

The court's Constitutional objections are also ill-founded. The essence of the movie regulation, far from being suppressive, is designed to insure that all the American people—not just a subscribing few—continue to receive the same movie feature quality as in the past. However, pay cable is not denied the opportunity to offer this same programming: under the rule, for three years, pay cable may show any theatrical feature film; thereafter, it may continue to show any theatrical feature film provided it *is also made available to all of the American people,* i.e. the vast majority who do not have and will not have either cable or pay cable available to them.

What the program producers plead for, in the name of the First Amendment, is not a right to show theatrical feature films—they have that right—but a right to keep theatrical feature films from the majority while selling the pictures, through rest and re-release, to an affluent minority of pay cable subscribers. And much more than delay is involved from the public's standpoint—witness the 37 years during which "Gone With the Wind" was withheld from free television. If the best feature and other entertainment programs are to be withheld for 10, 20 or 30 years, a major change in the programming of free broadcasting will result, to the public's detriment.

The producers claim a First Amendment right to market their product as they please. The simple answer to that contention is that their right to do "as they please" ends when they utilize a marketing system of cable television employing multiple television broadcast signals as the principal means of public attraction. As observed by the Chief Justice:[8]

> "The essence of the matter is that when they interrupt the signal and put it to their own use for profit, they take on burdens, one of which is regulation by the Commission."

The sports rule is similarly designed to insure the widest possible public availability of a maximum number of sports events. Its essence is that pay cable is (a) denied those specific events which are available to all of the American people and (b) limited in its use of non-specific events to insure that their level is not significantly reduced.

Recognizing that both the concept and administration of these regulations require flexibility, the Commission adopted a reasonable procedure for waiver, adequate to cure Constitutional objections which might otherwise have validity. See *Freedman v. Maryland,* 380 U.S. 51 (1965). The lower court's belittling of that procedure was totally unjustified (FCC App. 90-91), particularly since most of the delay in consideration of the single waiver request before the court was of its own making and it was the court's inaction alone which rendered moot the particular waiver request before it.

Further, if the court below is correct that the regulations are "overly broad" if follows inevitably that they are similarly objectionable in the case of over-the-air STV

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[8] *United States v. Midwest Video Corp., supra,* at 676.

regulations—regulations which were left intact. Reference to the fact that such regulations apply only to the use of "scarce spectrum" will not do. If regulation is "overly broad" it is so regardless of the technical means employed. It is illogical to suggest that regulation is "overly broad" for pay cable but "sufficiently narrow" for over-the-air services. The concept, by its terms, does not vary depending upon electronic means employed.

The fact is that the regulations (as noted by a different panel of the same circuit considering the far more restrictive pay television regulations then before it) insure "more rather than less diversity of expression" and "provide the public with additional information and ideas rather than repressing existing sources."[9]

It would be ironic for the First Amendment to require that programs now available to all U.S. homes be made available to a subscribing few. Absent regulation, that result is readily predictable.

IV.

The suggestion that regulation should be avoided because of the "fledgling" nature of the pay cable industry and the further suggestion that "if problems should eventually arise," it [the Commission] would have "ample time to respond to them in an appropriate and legal manner" (*Home Box Office* Brief, p. 4) are unacceptable. The decision below is not based upon the "fledgling" nature of the pay cable industry. Its holding that the Commission lacks statutory authority to regulate the pay cable medium and its Constitutional objections

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[9]*National Association of Theatre Owners v. FCC*, 136 U.S. App. D.C. 352, 366, 420 F.2d 194, 208, (1969), *cert. denied.*, 395 U.S. 922 (1970).

will not change with the growth of pay television which, it is estimated, will have 15 million subscribers by 1985.

V.

This Court's review of the decision below should be broad enough to comprehend consideration of the full extent of the Commission's authority to regulate pay cable and over-the-air STV as required in the public interest. Review should not be limited, as respondents suggest, to the validity of the sports rule alone. Unless we are prepared to say that the public's interest in the over-the-air television system is limited to sports events or that, for some unexplained reason, these are to be treated as unique, review must be as broad as the public interest problems posed.

We realize the Commission has sought limited review. We do not know why it has instructed its General Counsel to thus proceed. We do not know, for example, whether the Commission now believes it has no authority to regulate pay cable except in the sports area; whether it has accepted Constitutional limits on its regulation of entertainment programs but not of sports programs; whether it has simply concluded that its initial effort at movie regulation was poorly drawn and therefore defective; or whether it has concluded such regulation is not needed at this time.[10]

It is important for the Commission and for the public to know the parameters of the agency's authority to regulate pay television services in the public interest.

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[10]These questions are not elucidated by reference to one Commissioner's opinion that movie regulation would have been abandoned without court intervention. (See Columbia Opp., pp. 6-8).

Review by this Court, if limited to the sports rule alone, would not provide necessary guidance either for the present or the future.

The decision of which ABC and the National Association of Broadcasters seek review is broad in its terms, holding that the Commission has no statutory authority *at all* to consider the adverse public interest consequences of pay cable and, even if such authority were to be specifically conferred by Congress, there would be Constitutional impediments to such regulation. This Court's review must be equally broad and definitive.

Respectfully submitted,

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